Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

SANABEL EL-HAKEEM EL-ATTAR
PETITIONER

v.

MISSISSIPPI STATE UNIVERSITY, ETC., ET AL.
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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27 pp

QUESTIONS PRESENTED FOR REVIEW

I. DOES APPLYING AN ABSOLUTE CUT-OFF SCORE ON THE GRADUATE MANAGEMENT ADMISSION TEST (GMAT) SO AS TO BAR ADMISSION TO AN ARABIC SPEAKING FEMALE STUDENT TO A DOCTORATE PROGRAM, WHEN THE TEST CREATORS SPECIFICALLY STATE THAT SUCH TEST SCORES DO NOT ACCURATELY MEASURE THE SCHOLASTIC ABILITY OF THOSE WHO DO NOT SPEAK ENGLISH AS A FIRST LANGUAGE, DISCRIMINATE OR RESULT IN DISPARATE IMPACT IN VIOLATION OF TITLE VI AND/OR TITLE IX?

II. DID THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI AND THE FIFTH CIRCUIT COURT OF APPEALS COMMIT CLEAR ERROR IN IGNORING THE RESPONDENTS' BREACH OF PROMISE CONTAINED IN A LETTER TO THE PETITIONER PLEDGING HER ADMISSION TO THE DBA PROGRAM IF SHE SCORED 500 ON THE GMAT (THE PETITIONER SCORED 530)?

III. WERE THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI AND THE FIFTH CIRCUIT COURT OF APPEALS IN ERROR FOR IGNORING THE RESPONDENTS' RETENTION OF THE PETITIONER FOR THE PERIOD FROM 1985 TO 1990 WITHOUT ADMISSION TO THE DBA PROGRAM? GIVEN THE FACT THAT DURING THE RETENTION THE PETITIONER COMPLETED ALL OF THE REQUIRED COURSE WORK FOR THE DBA (BY BORROWING STUDENT LOANS AND SPENDING TIME AND EFFORT), WERE THE COURTS ERRONEOUS IN THEIR DECISION TO IGNORE THE ENSUED HARDSHIPS INFLICTED ON THE PETITIONER AND ACCEPT THE RESPONDENTS' CONTENTION THAT THE GMAT WAS NOT THE SOLE DETERMINATIVE FACTOR IN THE REJECTION?

LIST OF PARTIES

Sanabel El-Hakeem El-Attar, Petitioner

The Board of Trustees of State Institions of Higher Learning of the State of Mississippi, Respondent

Mississippi State University, Respondent

President of Mississippi State University, Respondent

Governor of the State of Mississippi, Respondent

Johnnie M. Haley, Counsel for Respondent

Robert G. Jenkins, Counsel for Respondent

R. Lloyd Arnold, Counsel for Respondent

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The Fourteenth Amendment to the United States Constitution

Petitioner, Sanabel El-Hakeem El-Attar, respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on September 1, 1995, which affirmed the judgment for the respondents previously entered in the United States District Court for the Northern District of Mississippi.

OPINION BELOW

Judgment was entered in this cause for the respondents on September 13, 1994, by the United States District Court for the Northern District of Mississippi, the Honorable L. T. Senter, Jr., United States District Judge, in cause number EC 91-326-S-D. Subsequently, this decision was affirmed by the United States Court of Appeals for the Fifth Circuit on September 1, 1995, in cause number 94-60678. The order affirming the judgment of the United States District Court for the Northern District of Mississippi is included in the appendix. The orders granting the respondents judgment as a matter of law from the United States District Court for Northern District of Mississippi are also included in the appendix.

STATEMENT OF JURISDICTION

The petitioner seeks review of the final decision of the United States Court of Appeals for the Fifth Circuit Court entered in this action on September 13, 1994. A judgment affirming the decision of the trial court was entered on September 1, 1995. This Court has jurisdiction to review this decision pursuant to *28 U.S.C. § 2101.*

STATEMENT OF THE CASE

Sanabel El-Hakeem El-Attar filed suit in the United States District Court for the Northern District of Mississippi, Eastern Division, in November, 1991. A bench trial was held on May 18-19, 1994. Subsequently, the cause was dismissed with prejudice pursuant to a September 13, 1994, Memorandum Opinion, on the ground that Respondents did not use the GMAT as a sole determinative factor for admission into the DBA program.

The decisions were appealed to the United States Court of Appeals for the Fifth Circuit, where the judgment was affirmed on the grounds that the Petitioner failed to establish that the respondents violated Title VI, Appendix p. A-14 and Title IX, Appendix p. A-14.

The Petitioner asserts that the ruling of United States Court for the Northern District of Mississippi and its affirmation by the United States Fifth Circuit Court of Appeals are in conflict with the decision of the Supreme Court of the United States in Ayers v. the State of Mississippi.

REASONS FOR GRANTING THE WRIT

BOTH THE DISTRICT COURT OF NORTH MISSISSIPPI AND THE FIFTH COURT OF APPEALS ARE IN DIRECT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA IN AYERS V. THE STATE OF MISSISSIPPI AND IN OTHER SIMILAR CASES.

1. The Petitioner was through with the Doctoral course work in January of 1989 (Plaintiff's Exhibit #21). At this point the use of the Graduate Management Admission Test (GMAT) was pointless and useless simply because: firstly, the GMAT has been designed to predict a student's performance in the first-year of study in graduate management programs, and secondly, the criterion of combining the GMAT score with the undergraduate grade-point average (UGPA) has become inapplicable at this stage (Plaintiff's Exhibit #21).
2. This case covers two eras: the first from 1985 to 1989, and the second from 1990 on. Dr. Capella (Respondents) was the only one involved with the admission process from 1985 to 1989. However, Dr. Callahan, the then head of the department and the academic advisor of the Petitioner, worked very closely with Dr. Capella in the admission of students to the master's and DBA's programs in his department. With the exception of Dr. Capella, none of the witnesses who testified on behalf of the Respondents was either part of the University personnel or aware of this issue. Heads of different departments worked closely with Dr. Capella in this task and were familiar with the status quo where the GMAT was a go-no-go measure from 1985 to 1989.
3. The fact that Dr. Callahan indicated that he was not responsible for the admission should not preclude that he knew what was happening. Dr. Callahan testified that "Capella turned her down because of GMAT skills" (Callahan Deposition p.11).
4. Dr. Callahan said: "In 1985, if you did not have GMAT score, you were not even passed forward for any further consideration. If you didn't make 500 on that GMAT in '85, you were terminated" (Callahan Deposition p.11).

5. Plaintiff's Exhibit #19 reaffirms and enforces Dr. Callahan's testimony that the Petitioner is terminated only because of the GMAT score.
6. Speaking of the GMAT, Dr. Capella testified that "It has been validated for MBA students. But not for doctoral students" **(T. p. 132 and Plaintiff Exhibit #12)**. How can Dr. Capella use an instrument which has not been validated for the DBA as a sole determinant to reject the admission of the Petitioner to the DBA Program? Moreover, combining the GMAT score with UGPA of the Petitioner is also illegitimate at this stage **(Plaintiff's Exhibit #12)**.
7. The fact that the GMAT is the only qualification spelled out in the Graduate Policies Committee minutes **(Plaintiff's Exhibit #19)** is a strong evidence of the unjustified use of the GMAT as the sole reason for rejecting the Petitioner's application.
8. The Respondents breached their agreement when the office of the President promised the Petitioner that if "you will retake the GMAT and make 500 (the 1985 standard), you will be admitted to the doctoral program which you applied in the College of Business and Industry" **T., p. 38 and T., pp. 210-211, and Plaintiff's Exhibit #7**. In 1992, the Petitioner achieved a score of 530 on the GMAT **(Plaintiff's Exhibit #20)**. However, she still was not accepted in the DBA program.
9. Title VI of the Civil Right Act of 1964 **(34 C.F.R. section 100.3 (b) (2)** and Title IX of the Educational Amendments of 1972 **(20 U.S.C. Section 1681 et seq.,)** prohibit the Respondents from establishing criteria or methods which have the effect of subjecting individuals to discrimination on the basis of sex, race, or national origin.
10. The Petitioner's completion of the required course work for the DBA is an evidence of her graduate, scholastic abilities **(Plaintiff's Exhibit #21)**.
11. Use of SAT scores by a state as a sole criteria for awarding merit scholarships violates a woman's rights under Title IX and the Fourteenth Amendments. **Sharif v. New York, State Education Department, 709 F. Supp. 345 (S.D.N.Y. 1989); see also United States v. Fordice, --, U.S. --, 112 S. Ct. 2727, 120 L.Ed.2d 575 (1992)** (use of cut-off standardized test scores as sole admission criteria (constitutional suspect).

CONCLUSION

The Court of Appeals and the District Court have shown an inability to properly interpret and apply the Federal laws in a case upon which jurisdiction is founded in diversity of citizenship. This error is a dramatic departure from accepted procedure. Also unacceptable is a judgment which accepts "hearsay" and shuns and neglects concrete, written evidences. This court should grant the petition for writ of certiorari.

Dated: 11-27-1995

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60678

SANABEL EL-HAKEEM EL-ATTAR,

Plaintiff-Appellant,

verses

MISSISSIPPI STATE UNIVERSITY, ETC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Mississippi
(1:91-CV-326-S-D)

B e f o r e:
GARWOOD, WEINER, and PARKER, Circuit Judges.

PER CURIAM:*

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts

Sanabel El-Attar ("El-Attar") is a naturalized citizen of the United States who was born in Egypt. She received a Bachelor of Commerce Degree from Ain Shams University in Cairo, Egypt, in 1959. In 1973, she received a Master of Arts Degree in Sociology from the University of Georgia. In 1980, El-Attar was accepted to the Master of Business Administration program at Mississippi State University ("MSU"). She received her degree in 1985.

From 1985 through 1991 El-Attar repeatedly applied for admission to the Doctor of Business Administration ("DBA") program at MSU. She was not accepted into the program. As a result of this continued rejection, El-Attar filed a civil rights action against MSU and others alleging she had been discriminated against because of her sex and national origin. El-Attar made claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), and Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681, asserting that MSU's exclusive use of the Graduate Management Admission Test ("GMAT") in admissions had a disparate impact on women and individuals who spoke English as a second language.

Following a bench trial, the district court entered its memorandum order that El-Attar's suit be dismissed because she failed to establish that the defendants violated Title VI and Title IX. The district court found that MSU did not use the GMAT as the sole determinative factor for admissions into the DBA program. The district court also found that El-Attar had not presented any "persuasive statistical data" or "credible expert testimony" to show that MSU's admissions policy for the DBA program had a disparate impact on females or individuals who spoke English as a second language. El-Attar timely filed a notice of appeal. We affirm.

Discussion

A. Finding that GMAT Score Was Not Solely Criterion for Admission:

El-Attar argues that the district court was clearly erroneous in its finding that MSU did not use the GMAT score alone to determine who would be admitted into the DBA program.[1] This Court reviews factural findings under the "clearly erroneous" standard. Fed. R. Civ. P. 52; Johnston v. Lucas, 786 F.2d 1254, 1257 (5th Cir. 1986). A district court's findings of fact are not clearly erroneous if they are "plausible in light of the record in its entirety." Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985).

The testimony of several MSU faculty members who sat on the DBA admissions committee supports the finding that the GMAT score was not the sole admission criterion. Dr. R. H. Gilmer, Director of Graduate Studies, testified that the GMAT was only part of the application to the doctoral program. The other parts included the applicant's statement of reasons for seeking admission, academic transcripts, and letters of reference. Dr. Louis M. Capella, currently a professor of marketing and one-time Director of Graduate Studies, testified that the GMAT score was not the only criterion for admission. Dr. Richard D. Koshel, dean of the graduate school, testified that in his experience at MSU the GMAT score was not a "go-no-go-decision." Dr. Jung P. Shim, a full professor of Management Information Systems, testified that admission to the MSU DBA program included consideration of GMAT scores, grade point averages, experience, and letters of recommendation. Dr. Mary Jones, an assistant professor of Management and Information Systems, testified that in reviewing applications for the DBA program she considers GMAT scores, grade point averages, letters of recommendation, work experience, and the applicant's written reasons for applying to the program. Dr. Rodney Andrews Pearson, an associate professor of Management and Information Systems at MSU, testified that reviewing an application consists of examining the entire application, including letters of recommendation, the applicant's narrative answers on the application form, the

[1]El-Attar devotes a great deal of her appellate brief to the argument that it is improper to use the GMAT as the sole admission criterion. As will be discussed below, the district court was not clearly erroneous in its finding that the GMAT was not the sole admission criterion. As such, whether such a policy is proper is not relevant to this case.

applicant's philosophies, the applicant's reasons for getting the degree, grade point averages, and GMAT score. Dr. Pearson testified that none of those items was absolutely determinative of whether an applicant was accepted. El-Attar testified that she knew of several other applicants who were admitted even though their GMAT score was below the recommended level.

Dr. Elias Richard Callahan, Jr., a former faculty member at MSU, testified in his deposition that the admission procedure for the DBA program was automatically halted if the applicant did not have an appropriate GMAT score. Dr. Callahan testified that he "had nothing to do with the admission process," and that Dr. Capella was in charge of the admissions process. El-Attar contends that Dr. Callahan alone testified as to the admissions practices prior to 1989. This is incorrect. Dr. Capella was the Director of Graduate Studies from 1982-89. His testimony was specifically directed to the time when he was the director. He personally recalled El-Attar's 1985 application.

Given the consistent testimony of the faculty involved in the admissions process, it cannot be said that the district court was clearly erroneous in finding that the GMAT would not by itself stop an application, notwithstanding the testimony of Dr. Callahan. The district court was not clearly erroneous in its factural finding.

B. Disparate Impact Claim:

El-Attar asserts that "MSU's sole reliance upon GMAT scores to cut-off acceptance to the DBA program disparately impacts female students" and "international students whose native language is not English." Thus, her disparate impact claim is dependent on a finding of sole reliance upon GMAT scores. As we have already held that the district court was not clearly erroneous in its finding that MSU did not solely rely on GMAT scores, the disparate impact claim fails as well.

AFFIRMED
S/CHARLES R. FULBRUGE, III
DEPUTY CLERK

Mr. Richard Lloyd Arnold
Mr. Robert Garfield Jenkins
Mr. Johnnie M. Haley
Ms. Kelly Hardwick

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SANABEL EL-HAKEEM EL-ATTAR,

Plaintiff,

versus

Civil Action No. EC91-326-S-D

MISSISSIPPI STATE UNIVERSITY, ETC., ET AL.,

Defendants.

MEMORANDUM OPINION

This cause is before the court following two days of testimony, whereupon the court reserved issuing an opinion. During trial the parties stipulated that the defendants were being sued in their official capacities only.

Facts

The plaintiff is a naturalized citizen of the United States, but was born in Egypt. Her native language is Arabic and she speaks English as a second language. In 1973, she received a Masters of Arts (M.A.) degree in Sociology and Demography from the University of Georgia. She received a Masters of Business Administration (M.B.A.) and a Masters of Science in Business Administration (M.S.B.A.) in Information Systems from Mississippi State University.

In 1985, the plaintiff applied for admission into the Doctoral of Business Administration (D.B.A.) program at MSU, but was denied. Only the minutes of the December 12, 1985, Graduate Policies Committee Meeting survive the plaintiff's earliest application. The minutes read:

> The committee voted not to admit Sanabel El-Attar to the doctoral program based upon her present qualifications. The student will be offered the option to retake the GMAT. If the acceptable score can be achieved, the Committee will reconsider her application for the DBA program at a later date.

Between 1985 and 1991, the plaintiff took the GMAT exam and applied for admission to the DBA program. She did not achieve a score over 500 until 1992. She was never accepted into the DBA program.

The plaintiff alleges that she has been denied admission because her Graduate Management Admission Test (GMAT) score failed to reach the graduate program's minimum score of 500. She maintains that the GMAT was used by MSU as the go/no go factor for her admission, and since women and persons of foreign origin consistently score lower than other individuals, then use of a minimum GMAT score as a determinative factor inflicts a discriminatory disparate impact.

The Bulletin of the Mississippi State University graduate school sets forth the standards for the doctoral program. An applicant must score a 550 on the GMAT (in 1986 it was 500) and a cumulative quality point average (QPA) of 2.75 out of 4.0; plus a minimum QPA of 3.25 on all prior graduate work in business; no more than 20 percent of which can be below a "B". The Bulletin specified that: "Consideration will be given to an applicant who is deficient in not more than one of the specifica-

tions cited above." The defendants argue that the plaintiff never scored higher than 490 on the GMAT, and did not have a QPA appreciably higher or outstanding recommendations to counter her GMAT deficiency. Dr. Rodney A. Pearson, Associate professor of management information systems and director of the plaintiff's master's thesis, did not recommend the plaintiff for admission into the D.B.A. program. He stated during trial that: "I did not believe the depth of her knowledge was sufficient for her to teach in this field." The defendants assert that the individuals admitted into the DBA program who failed to score 500 or better on the GMAT had QPAs markedly better than the requirements which balanced the applicants overall qualifications. The defendants propose that this shows that they did not use the GMAT as the determinative factor, and additionally, that it is evidence of a nondiscriminatory reason for accepting the applicants of non-foreign origin who, like the plaintiff, failed to score 500 on the GMAT.

Even though the plaintiff was never accepted into the DBA program, she was allowed to continue taking courses after she had completed her M.S.B.A. She has taken over 76 hours in graduate classes towards her D.B.A. degree. The plaintiff has served as a graduate assistant in the Business School and taught several undergraduate classes. The plaintiff contends that she has completed all requirements for a D.B.A. program, except for the comprehensive exams and her dissertation. Several of the defendants' witnesses who were professors testified that since they expected higher quality from D.B.A. candidates and assigned then a greater quantity of work, the extra course work the plaintiff has taken has no application towards her D.B.A. degree.

Discussion

"In the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7, Congress abrogated the States Eleventh Amendment immunity under Title IX [and] Title VI . . . ." Franklin v. Gwinnett County Pub. Sch., 117 L.Ed.2d 208, 221 (1992). During the trial, before the plaintiff had rested, she stipulated that her suit was only against the defendants in their official capacity and that her Title VI claim was strictly based on national origin. The court assumes that her Title IX claim remains.

A. National Origin Discrimination

Title VI, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.

A Title VI action can now be maintained as either a disparate treatment case, where proof of discriminatory motive is critical, or as a disparate impact case, involving practices that are facially neutral, but which result in adverse treatment of different groups. While Title VI itself, like the Fourteenth Amendment, bars only intentional discrimination, the regulations promulgated pursuant to Title VI make it unlawful to effect disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory. See Guardians Asso. v. Civil Service Com., 463 U.S. 582, 584 n.2 (1983); Alexander v. Choate, 469 U.S. 287, 292-94 (1985); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406 (11th Cir. 1993). Proof of discriminatory intent is not necessary in a disparate impact case. The Supreme Court also has held that proof of disciminatory intent is not required in a Title VI action for equitable relief. See Castaneda v. Pickard, 781 F.2d 456, 465 n.11 (5th Cir. 1986).

The United States Department of Education has promulgated regulations pursuant to Title VI that prohibit recipients of its funds from taking certain actions which have a disparate impact on groups protected by the statute. The regulations state in its pertinent part:

> A recipient . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

34 C.F.R. § 101.3(b) (2) (emphasis added). Most Title VI disparate impact cases in the educational context have involved challenges to the classification of students by ability through the use of standardized test and other methods. See Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985) (challenge to use of achievement grouping in Georgia public schools); Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984) (challenge to use of certain IQ tests to assign children to classes for educable mentally retarded); cf. Sharif v. New York State Educ. Dep't, 709 F.Supp. 345 (S.D.N.Y. 1989) (Title IX disparate impact challenge to use of Scholastic Aptitude Test to allocate state merit scholarships; court borrows Title VI disparate impact standards).

> To establish liability under the Title VI regulations disparate impact scheme, a plaintiff must first demonstrate by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI. [T]he defendant then must prove that there exists a substantial legitimate justification for the challenged practice in order to avoid liability. [T]he plaintiff will still prevail if able to show that there exists a comparably effective alternative practice which would result in less disproportionality, or that defendant's proffered justification is pretext for discrimination.

Elston v. Talladega County Bd. of Educ., 997 F.2d at 1407. The plaintiff must show that "a facially neutral . . . practice has the result of producing a significantly adverse impact . . . ." Page v. U.S. Industries, Inc., 726 F.2d 1038, 1045 (5th Cir. 1984). Then the defendant must show that the challenged course of action is demonstrably necessary to meeting an education goal. See Georgia State Conference, 775 F.2d at 1418.

The plaintiff alleges that the GMAT is used as the determinative factor for admission to the DBA program. This is not the conclusion the court has reached. The bulletin that articulated the guidelines for application to the DBA program states that an applicant should have a minimum 500 score, but that consideration is given to applicants who have deficiencies which are minimized by other performance factors.

Repeated testimony by professors in the program showed that factors other than the GMAT score were considered. The court is most struck by the poor recommendation the plaintiff received from her master thesis advisor, Dr. Rodney A. Pearson. Finally, the court notes that some applicants who had been accepted into the DBA program had scored below 500 on the GMAT. This indicates that the GMAT was not the determinative factor.

The plaintiff has submitted as evidence of the disparate effect of the use of the GMAT as an admission criteria, an incomplete list of vital information about applicants and admitted students. The plaintiff compiled no final statistical analysis of the raw data, nor did she provide any expert assistance as to how to derive hard numbers from the list. The court reluctantly admitted the lists under the understanding that, being a nonjury trial, the court would give the evidence appropriate weight after conclusion of all of the evidence. It seems the plaintiff is seeking the court to take judicial notice that use of the GMAT has a disparate impact upon females and persons of foreign origin. The court cannot categorically do so. Although the manufacturers of the GMAT warn of using it as the sole criteria for determining admission and of its propensity for returning lower scores to females and persons of foreign national origin, this does not sway the court to find disparate impact in this particular circumstance, especially, in light of the overwhelming evidence that the GMAT was not the determinative factor for admission, and the questionable qualification of the plaintiff. The court concludes that there is no proof that the defendants used a score of 500 on the GMAT as the determinative factor for admission, nor is there any credible evidence of disparate impact in the implementation of the admission proceduce.

B. Sex Discrimination

Title XI, 20 U.S.C. § 1681(a), provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal Financial assistance . . . .

The Fifth Circuit Court of Appeals held in Chance v. Rice University, 984 F.2d 151, 153 (5th Cir. 1993), that Title IX required a showing of intentional discrimination. The plaintiff has presented no proof of intent, but has argued pursuant to the regulations drafted under Title IX that use of the GMAT effects a disparate impact upon females. In Guardians Asso. v. Civil Serv. Com., a bare majority of the United States Supreme Court held the regulations of Title VI to validly provide for a disparate impact standard. The Department of Education's regulations implementing Title IX are crafted after Title VI regulations and prohibit some facially neutral policies. See Cannon v. University of Chicago, 441 U.S. 677 (1979) (Title IX patterned after Title VI). The regulations provide that:

> A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

34 C.F.R. § 106.21(b)(2). The court holds that a cause of action can be maintained pursuant to these regulations without proof of discriminatory intent. See Sharif, 709 F.Supp. at 361.

Although the court has concluded that the GMAT has not been used by the defendants as the determinative factor for admission into the DBA program, the court is concerned that the language of the regulation bars any use of a test which has a disparate impact. In Sharif, the plaintiffs challenged the use of the Scholastic Aptitude Test (SAT) as the basis for awarding New York State merit scholarships by way of a preliminary injunction. The plaintiffs presented persuasive statistical evidence and credible expert testimony to prove that using only the SAT had a disparate impact on females. The Sharif court concluded that since the SAT was used as the sole basis for awarding the scholarships, and since the SAT was convincingly shown to have a disparate impact on females, then the plaintiff would likely succeed on the merits. This

court sees no reason to depart from this deductive conclusion. Again, the overwhelming proof indicated that the defendants did not use the GMAT as the sole criteria for admission. The plaintiff has not presented the court with persuasive statistical data, nor any credible expert testimony. Finally, the court is suspicious of the plaintiff's qualification to be admitted to the DBA program.

The court concludes that the defendants' use of the GMAT as a factor for admission has a legitimate educational justification. The court will not interfere with the defendant's admission procedure, barring some evidence of disparate intent or impact.

> Judicial evaluation of academic decisions requires deference and they are overturned only if they are "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."

Williams v. Texas Tech Univ. Health Sciences Ctr., 6 F.3d 290, 294 (5th Cir. 1993) (quoting Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 225 (1985)). "A state university has a significant interest in having reasonable discretion to administer its education programs." Williams, 6 F.3d at 293. Finally, the court will note that although the plaintiff has taken sufficient credit hours to have completed her classwork for a doctorate degree, she did not take the courses as a DBA student. The testimony and common sense establish that there is a difference in the treatment of students taking a class for credit towards a masters degree and those taking the same course for a doctorate degree.

Accordingly, IT IS THE OPINION of the court:

That the plaintiff has failed to establish that the defendants have violated the regulations drafted under Title VI and Title IX. The court finds for the defendants. The plaintiff's complaint is dismissed with prejudice.

SO ORDERED this 13th day of September, 1994.

Appeal from the United States District Court for the
Northern District of Mississippi

B e f o r e:

GARWOOD, WEINER, AND PARKER,
Circuit Judges.

J U D G M E N T:

This cause came on to be heard on the record on appeal and was judged following a bench trial.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the district court in this cause is affirmed.

Title VI states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
> 42 U.S.C. § 2000d

Title IX states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .
> 20 U.S.C. § 1681.